82-6267

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONNIE RAY EVANS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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ISSUES PRESENTED

1. Where there is no trial on the facts in a guilt phase of a proceeding regarding the alleged commission of capital murder and an objective reviewer of the facts might well have found that prior intent was not an element of the killing, will a sentence of death be in harmony with the Eighth Amendment?

2. Where the state Supreme Court on review found one of the aggravating circumstances used by the jury to buttress its application of the death sentence -- the "heinous, atrocious and cruel" factor -- to be totally unsupported by the facts, can a sentence of death be constitutionally carried out on a basis including that factor? Further, where death is caused by the perpetrator instantaneously and there has been no infliction of any kind of physical torture prior to death, can the perpetrator constitutionally be sentenced to death?

3. Where a juror with some conscientious scruples about the application of the death penalty but nevertheless "death qualified," i.e. willing to listen with an open mind to arguments in favor of exacting the death penalty and prior to hearing such arguments willing to apply the death penalty in certain circumstances, i.e. multiple killings by the same perpetrator, is excluded from the jury, is the defendant's right to a fair trial and judgment by a representative cross-section of the community preserved?

4. Where the prosecution appoints a psychiatric expert prior to trial to evaluate defendant's competence to stand trial and the defense makes no effort to obtain its own expert or have the court appoint an expert responsive to its side of the case, is the adversarial process adequately served and has defendant's right to a fair trial been adequately safeguarded?

5. Was the fairness of the penalty-phase trial in the instant case contaminated by introduction of inflammatory and prejudicial guilt-phase evidence of which the materiality and relevance had been obviated by the defendant's prior guilty plea?

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of Mississippi, Evans v. State, ____ So.2d____ (Miss. 1982) is as yet unpublished and is set out in mimeographed form in Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on November 3, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioner pled guilty in the Circuit Court of Hinds County, Mississippi to the fatal shooting of the proprietor of R.J.'s Food Center, Arun Pahwa, during a robbery. The shooting by one bullet striking the head was instantaneously fatal and occurred when the victim rose up from the floor after his cash was taken and the store telephone rang. Co-defendant Artis claimed that the petitioner told him he fired because he was "cold-hearted" (Transcript, 239) but his prior testimony suggested a sudden impulse of fear at the phone ringing caused the petitioner to fire the fatal short (Transcript, 234). While police interrogation purported to establish that the petitioner may have considered it necessary to be prepared to take life in committing the robbery, his testimony on the stand under the prosecution's cross-examination did not establish that he fired from some preconceived notion that Pahwa had to be eliminated and left open a strong possibility that the killing occurred on his frightened impulse.

Q. All you were thinking about was the telephone ringing?

A. What telephone?

Q. Isn't that when you shot the man?

A. Yes, the phone did ring.

Q. And that's when you shot him?

A. No.

Q. When did you shoot him?

A. It was about a split second difference in that.

Q. The phone rang and tnen you shot him?

A. Yes.

Q. So the phone didn't have anything to do with your shooting him, did it?

A. I don't know.

Q. You don't know?

A. No.

Q. You're not telling us that it had anything to do with it, are you?

A. I'm telling you I don't know. (Transcript, 318)

The foregoing colloquy hardly justifies prosecution's conclusion at summation (Transcript, 371) that petitioner had answered in the negative to a question (which the prosecution falsely claimed to have asked) that the shooting occurred "because the phone startled you(?)"

Further, it was never established that the cold-heartedness petitioner allegedly confessed to co-defendant Artis was actually cold-bloodedness or cruelty rather than cowardice or "cold feet." In any event, no physical torture of the victim had been involved.

All the testimony, including that of the state's forensic pathologist, Dr. Galvez, (Transcript, 219), indicated that the victim, Pahwa, died from one gunshot wound instantaneously, but the rest of Dr. Galvez's testimony on direct (Transcript, 211-218) and testimony of police officers, particularly Officer Allen, as to the crime scene (Transcript, 141 ff) and as to matters including the victim's wife having been in the eighth month of pregnancy (Transcript, 145), as well as emotionally inflammatory but non-probative testimony of the victim's brother (Transcript, 192-195) were inflammatory material the introduction

of which was obviated as to materiality by defendant's guilty plea. Clearly this was guilt-phase testimony obtruding into a penalty phase trial.

On the theory that the crime was an "execution style" murder (Transcript, 340) and without conclusively proving either premeditation or even intent, the prosecution asked for an instruction of the heinous, atrocious, and cruel aggravating factor, which the jury found. The Supreme Court of Mississippi, on review, found the factual basis of this factor to be totally lacking in the evidence, ____ So.2d____.

Voir dire person Mary Rouchon was challenged by the prosecution for cause and excluded from the jury (Transcript, 55-56) on admitting strong scruples regarding the imposition of the death penalty, but Ms. Rouchon's testimony included a statement that she would consider the death penalty for a person committing multiple murders and an openness of mind amounting to being "death qualified."

Further, the prosecution entered a hospital report dealing with defendant's competence to enter a guilty plea (and by implication to stand trial) (Transcript, 23). The defense apparently made no attempt during the pre-trial period or thereafter to have defendant examined by its own psychiatric expert or to have the court appoint a psychiatrist responsive to the defense side of the case.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PRESENTED BELOW

The Supreme Court of Mississippi in dealing with the co-perpetrator's statement that the petitioner killed the victim "cold-hearted(ly)" noted petitioner's statement that he had not intended to kill -- "I didn't mean to do it and I'm sorry." The Mississippi court dealt with the intent question merely by noting another case in which it found parallel a lack of necessity of the perpetrator to kill and did not directly address the question of intent which it had raised by making reference to petitioner's self-exculpatory statement at trial.

Mississippi's highest court also indicated a great deal of skepticism that the heinous, atrocious, and cruel factor had been adequately proved in the trial court, while maintaining that it believed three other aggravating circumstances had been proved "by overwhelming evidence." The court did not directly address the problem raised in Stephens v. Zant, infra, that the penalty phase recommendation of the jury could be rendered defective by the presence of one fallaciously invoked factor in its deliberations.

The death-qualified juror's removal on prosecution's challenge for cause was treated by the court without noting that in response to defense attorney's question the said juror said she could vote for death in the multiple-killings situation. Thus the Mississippi Supreme Court dealt with the Witherspoon problem through a selective filtering of the facts.

At page 22 of the trial transcript, the Hinds County Circuit Court described defense attorney Bell as "an experienced and capable attorney." Such description would include in mandated activities of a capable attorney in a capital murder case diligence in preparation and investigation of all aspects of the case and any possible defenses, witnesses, or tactics that might be useful to the defendant, including an investigation of incompetency to stand trial through examination by the defense's expert. Regarding diligence in preparation, see Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979) and U.S. v. Bridgeman, 523 F.2d 1099 (D.C. Cir. 1975).

The Mississippi Supreme Court claimed that the highly emotional testimony of Baldev Raj, the victim's brother, was needed as a foundation for identifying the victim at the penalty phase. The court did not explain how such identification was needed after petitioner pled guilty to killing Arun Pahwa. The court further said that slides showing the victim were relevant to the proving of the heinous, atrocious and cruel factor, which proof it subsequently rejected as inadequate. The court did not deal directly with what petitioner holds to be the guilt-phase oriented testimony of the forensic pathologist and the arresting officers regarding the crime scene. Thus the Mississippi court found no obtrusion of guilt phase testimony into the petitioner's penalty phase trial.

REASONS FOR GRANTING THE WRIT

The holding of Enmund v. Florida, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) makes clear that one who does not intend to kill or cause death cannot be sentenced to a capital penalty

in the United States (see also Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 973 (1978)). In the case at bar, the finder of fact very well could have concluded that the preponderance of the evidence showed the defendant fired at the victim motivated in an instant by a sudden surge of fear caused by the ringing of the store telephone. On the record available to petitioner there is no finding of fact by court or jury on this point and certainly not one that would contradict the theory petitioner herein proffers with regard to what the evidence showed regarding intent more properly or the lack thereof.[1/]

Further, where the killing is instantaneous and there is no aggravated battery before death or physical torture of any kind, the heinous, atrocious and cruel aggravating factor may not be applied by the fact-finder in determining whether the death penalty will be recommended, Godfrey v. Georgia, 446 U.S. 420, 64 L. Ed. 2d 398 (1980). In the case at bar, petitioner fired one shot which was instantaneously fatal and the victim was not forced to submit to any battery or sort of physical torture before the firing of the shot that killed him. The Supreme Court of the state of Mississippi found that the petitioner's penalty phase jury incorrectly applied the heinous, atrocious and cruel factor against him, ____ So. 2d ____ (1982), although it approved other factors used in condemning

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1/ The Mississippi statute under which petitioner was charged, Miss. Code Ann. §97-3-19, contains no element of intent or scienter as a constituent of capital murder and thus the guilty plea entered on petitioner's behalf in the Circuit Court of Hinds County was not an admission that any purported killing was done with an element of intent.

him. In Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), presently sub judice in this court, a death sentence was vacated where one aggravating factor under consideration by the jury was subsequently declared unconstitutional by the Georgia Supreme Court. Although other, valid aggravating factors were present and under consideration by the jury, the Fifth Circuit held that the jury's deliberations might have been tainted by consideration of the unconstitutional aggravating factor and were not sufficiently channeled to make its proceedings on application of the death penalty rationally reviewable. Here, where the state Supreme Court finds that the factual conclusions of a jury on the heinous, atrocious and cruel factor will not pass muster, the facts of the case are in pari materia with Stephens v. Zant, supra. Thus petitioner's sentence may not have been recommended by a jury uninfluenced by constitutionally tainted considerations and may be beclouded as to rational review of the deliberations leading up to it.

One prospective member of the jury panel was challenged by the prosecution for cause and removed after she indicated scruples about the application of capital punishment. However, she stated on voir dire that she could think of a situation - multiple murders by a single perpetrator - in which she would consider application of the death penalty. Thus, her mind was not completely closed to arguments favoring application of the death penalty in a particular case and showed no disposition to reject summarily the death penalty where the law and the facts of a particular case as the prosecution might conscientiously and lawfully develop them would lead a person with such a modicum of willingness to apply the death penalty.

Thus Ms. Rouchon was a death-qualified juror in the sense developed by Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776 (1968),[2/] and her removal for cause by the prosecution denied petitioner judgment by persons forming a cross-section of the community with all reasonable and representative shadings of opinion on jurisprudential matters.

It is clear that as to the matter of criminal responsibility the defense is to be allowed a court-appointed psychiatrist responsive to its interests, at least to the extent of one rigorous and complete examination and follow-up, U.S. v. Chavis, 476 F.2d 1137 (D.C. Cir. 1973), and furthermore where the prosecution's evidence for its case-in-chief is uncontroverted and where the only prop for defendant is diminished criminal responsibility at the time of commission of the offense due to insanity, the defense counsel must, in order to render competent representation, move for a court-appointed psychiatrist ready to examine and report back to the defense and present testimony in court, if appropriate, U.S. v. Fessel, 531 F.2d 1275 (5th Cir. 1976). See also U.S. v. Walker, 537 F.2d 1192 (4th Cir. 1976).

Where the defendant is well-heeled and or influential or connected to persons of influence, it seems taken for granted that he will have his own psychiatrist available to present

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2/ See also Adams v. Texas, 448 U.S. 38, 65 L. Ed. 2d 581 (1980); Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981); Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980); Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Ladetto v. Massachusetts, 403 U.S. 947 (1971); Turner v. Texas 403 U.S. 947 (1971); and Marion v. Beto, 434 F.2d 29 (5th Cir. 1970). And with regard to the exclusion of one scrupled but qualified juror, see Davis v. Georgia, 429 U.S. 122 (1976).

appropriate evidence as to competence to stand trial, U.S. v. Hoffa, 402 F.2d 380, vacated 394 U.S. 310 (7th Cir. 1968), (not James Hoffa, but his cohort Dranow directly involved in this case) and U.S. v. Hearst, 563 F.2d 1331 (9th Cir. 1977). Cf. U.S. v. Morgan, 567 F.2d 479 (D.C. Cir. 1977), which sets general guidelines for insuring that both prosecution and defense have equal access to psychiatric information and evidence. Ordinarily, the court will appoint a psychiatrist chosen by defense counsel to assist the defendant in preparing a psychologically oriented case, U.S. v. Matthews, 472 F.2d 1173 (4th Cir. 1973). The interest in avoiding multiple expert witnesses must be subordinated to the demands of the adversary process and will take precedence only on consent of a vigorously conducted defense effort (such consent not conceived as a frequent likelihood), ibid. Further, in a competency hearing, the government is to aid financially in many instances in the provision of adequate defense-oriented psychiatric expertise and is to carry the burden of proof on competence, although it, of course, must also have the right in attempting to meet its burden to conduct its own examination(s), Pope v. U.S., 372 F.2d 710, 720 (8th Cir. 1967); see also, Merrill v. U.S., 338 F.2d 763 (5th Cir. 1964). Competency, further, may first emerge as an issue even after a fact-finding of guilty, and, most clearly, both sides must be allowed to develop psychiatric findings and evidence in full, U.S. ex rel. Rivers v. Franzen, 522 F. Supp. 443 (N.D. Ill. 1981). Finally, in penalty phase proceedings, the defense must be allowed to

prepare to rebut a prosecution psychiatrically-based case as to the factor of future dangerousness, and where the prosecution attempts a Trojan horse tactic by introducing its expert to the defense in the guise of determining competency only, grounds for issuance of a writ of habeas corpus will be found. Further,

> Effective cross examination and the ability to obtain a psychiatric expert for the defendant are especially critical when psychiatric testimony is introduced because studies have shown that the opinions of psychiatrists in this area are often unreliable and invalid. Smith v. Estelle, 445 F. Supp. 647, 655 (N.D. Tex 1977).

In the instant case, at trial in Hinds County, your petitioner would have been better served by counsel more alert to the possibilities, both positive and negative, of the psychiatric door opened by the prosecution in seeking an examination by its psychiatrist for competence and should have been prepared, in attempting to secure a truly fair adversarial proceeding, to develop its own case on psychiatric issues.

Smith v. Estelle, supra, further demonstrates the necessity of segregating the evidence of various stages of proceeding in order to preserve defendant's right to a fair trial. Clearly, evidence-gathering and presenting activities for the prosecution case as to defendant's competency to stand trial cannot be allowed to meld completely at a future stage with parts of the case in a penalty phase proceeding on a "punitive-prone" factor such as future dangerousness. The danger is even greater where the prosecution's tactic is to obtain surprise by not disclosing its intent to present expert testimony as to a dangerousness penalty-phase factor as in Smith.

It is clear as to guilt and insanity phases that the two bodies of evidence must be kept separate. The court in a criminal case not only has broad discretion in considering bifurcation, but also in prescribing its procedure, as well as the form of the charge and submission of questions to the jury, and the admissibility of evidence in each stage (and even the impannelling of a second jury to hear a second stage required by bifurcation if this seems necessary to avoid prejudice), Parman v. U.S., 399 F.2d 559, cert. denied 393 U.S. 858 (D.C. Cir. 1968). See also for prejudicial effect of evidence introduced improperly at one phase and only properly admissible at another, Holmes v. U.S., 363 F.2d 281, 282 (D.C. Cir. 1968).

In the case at bar, inflammatory and immaterial testimony by arresting officers, forensic pathologist, and (totally non-probative at any stage) of the victim's brother, the need for which was totally obviated by the defendant's guilty plea, was introduced at the penalty phase of petitioner-defendant's trial. Clearly this procedure negated the cordon sanitaire against undue prejudice erected by Smith, Parman and Holmes.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,754

CONNIE RAY EVANS

V.

STATE OF MISSISSIPPI

EN BANC.

ROY NOBLE LEE, JUSTICE, FOR THE COURT:

Connie Ray Evans and Alfonso Artis were jointly indicted in the Circuit Court of the First Judicial District of Hinds County, Honorable William F. Coleman, presiding, on a charge of capital murder. Evans entered a plea of guilty to the charge and the trial proceeded on the sentencing phase. After hearing the evidence, the jury found Evans guilty and sentenced him to death. He has appealed and assigns ten (10) errors in the trial below.

FACTS

Connie Ray Evans was twenty-one (21) years of age at the time of the homicide. On the night of April 7, 1981, he and Alfonso Artis, age twenty-four (24), met at the Alamo Theater on Farish Street in the City of Jackson, Mississippi, and planned to rob R.J.'s Food Center on Lynch Street. They considered the fact that gunplay might be involved in the robbery. About 6:30 the following morning, Artis went to the house where Evans lived with his mother and stepfather, and they left together for the R.J. Food Center. Upon arrival there, they walked by the store on two occasions but did not enter because customers were present. After waiting approximately one-half hour, they began the robbery. Artis went

inside with a gun while Evans waited outside and watched for trouble. Artis drew the gun on Arun Pahwa, the store attendant, and forced him at gunpoint to get on his knees behind the counter. Evans entered the store, received the gun from Artis, held it on Pahwa and guarded him while Artis checked the cash register. Artis could not open the cash drawer, and Pahwa was made to get up from the floor, open the cash register and then was forced to kneel again. Artis collected money from the cash register and then searched and emptied Pahwa's pockets and wallet.

Evans shot Pahwa in the head as he knelt motionless behind the counter and the two ran out the door. They had obtained approximately one hundred forty dollars ($140.00) in the robbery. Artis took off his shirt and wrapped the gun in it as they ran. Later, he gave the gun to Evans, who wiped away some of the fingerprints, and they hitchhiked to appellant's brother's house where Evans hid the gun behind a clock. They left there, caught a bus to the downtown area, and spent most of the money on new clothes. That night, they went to a movie, drank beer at a local club, then separated and went home. Evans told Artis that he shot Pahwa because "I was cold hearted."

The police were notified of the robbery and murder and went to the scene where they found the cash drawer open and Pahwa lying behind the counter in a pool of blood. The cause of death was a gunshot wound in the head. As a result of the police investigation, Artis was apprehended on the night of April 8, 1981, and Evans was arrested seventeen (17) days later on April 25, 1981. He stayed on the streets during this time and finally telephoned his mother and decided to give himself up. Evans gave a written confession to the crime. Artis pled guilty to charges of armed robbery and manslaughter and received a sentence of twenty (20) years, with fifteen (15) years suspended. He testified for the State on the trial.

LAW

I.

Did the trial court err in striking for cause a juror who was irrevocably committed to vote against the death penalty regardless of the facts and circumstances presented?

On voir dire examination, a female juror stated that she had conscientious scruples against the infliction of the death penalty; and that she had strong feelings about sending somebody to jail or giving them the death penalty. She said:

> Q. I would assume that the lesser of the two would be to send someone to jail, so are you sure that you couldn't sentence someone to death?
>
> A. I am positive.
>
> Q. You are positive you couldn't return a verdict recommending the death penalty, is that correct?
>
> A. Yes, sir.

The prospective juror qualified her feeling against the death penalty by saying that, if a person had killed several people she probably could vote for the death penalty. Also, she vacillated some when interrogated by the appellant's attorney. She responded further:

> Q. I see. So a murder in the process of a robbery you could not vote for the death penalty under any circumstances, is that correct?
>
> A. (Juror nodded)
>
> * * * *
>
> Q. No question in your mind about that? You could not follow the law if the law was that you are to consider the death penalty and you decide on whether or not it's a bad enough case, and you couldn't even consider it if it was just one person killed?
>
> A. If someone killed someone else, like I said, out of fear because they had robbed a store, no.
>
> Q. I'm not asking you in self-defense or anything like that. Self-defense we wouldn't be here. He wouldn't have pled guilty.
>
> A. (Juror nodded negatively).
>
> Q. Your answer is still no, you could not consider it?
>
> A. (Juror nodded negatively).
>
> Q. Under any circumstances?
>
> A. (Juror nodded).

The principle involved here was stated in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). It has been followed many times, and recently in Edwards v. State, 413 So. 2d 1007 (Miss. 1982), where the Court said:

> First argument made relates to the exclusion of juror Hibler on the ground of "conscientious scruples" against the death penalty. Juror Hibler was asked by the circuit judge if she could follow the testimony and instructions of the court although the "verdict could result in the death penalty"; juror Hibler said, "I couldn't."
>
> Upon this state of juror Hibler's voir dire examination, she was excused and the defendant urges reversible error under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Having categorically stated that she couldn't follow the testimony and instructions of the court, we think that the juror was correctly excluded. The fact that upon questioning by defense counsel, Hibler stated she would try to be a "fair" juror did not qualify her in this case. Similar argument was made in Edwards v. State, supra, n. 1, but there the sentence was life imprisonment whereas here the sentence is death. Thus, the two cases are not precisely analogous. For an excellent explanation of the proper method of bringing the death penalty to the attention of the special venire in capital cases, see Armstrong v. State, 214 So.2d 589 (Miss. 1968). [413 So. 2d at 1009].

See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1969); Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969); Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).

In Irving v. State, 361 So. 2d 1360 (Miss. 1978), we said:

> Following Witherspoon, this Court considered the procedure to be employed by trial judges in Myers v. State, 254 So.2d 891 (Miss.1971). That procedure follows:
>
> "'The proper method of bringing the death penalty to the attention of the special veiremen is for the trial judge to inform them that they have been summoned as veniremen in a capital case and that a verdict of guilty could result in the infliction of the death penalty. The judge should then ask them if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it, in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the

> death penalty, the trial judge should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions of the court should be retained, and those who cannot follow the instructions of the court should be released. The mere fact that a venireman is opposed to the death penalty does not disqualify him as a juryman, if he can do his duty as a citizen and juror and follow the instructions of the court, and where he is convinced of the defendant's guilt he can convict him although the verdict of the jury may result in the death penalty's being inflicted upon the defendant.' (Emphasis added). Armstrong v. State, Miss., 214 So.2d 589, at 593." 254 So.2d at 893-894. [361 So. 2d at 1360].

We are of the opinion that there is no merit in the first assignment.

II.

Did the lower court err in admitting evidence of appellant's non-violent criminal record as proof that the capital murder was "committed by a person under sentence of imprisonment," pursuant to Mississippi Code Annotated § 99-19-101(5)(a) (Supp. 1982)?

The appellant contends that when an accused receives a suspended sentence for a non-violent crime, such sentence may not be subsequently used in a capital murder trial to prove that, as an aggravating circumstance, the murder was "committed by one under sentence of imprisonment." He relies upon Peek v. State, 395 So. 2d 492 (Fla. 1980), wherein the Florida Supreme Court held that a defendant's probationary status was not a sentence of imprisonment, which would support Subsection (5)(a) of the statute. However, in Peek the death sentence was upheld on appeal in spite of the court's determination that a probated sentence had been erroneously included as an aggravating circumstance. The Florida Court said:

> Thus, we have two clearly valid aggravating circumstances, one contested but valid aggravating circumstance, and no mitigating circumstances. We find that the trial court's improper consideration of the two aggravating circumstances concerning pecuniary gain and commission of the offense while on probation does not render the sentence invalid. Hargrave v. State, 366 So.2d 1 (Fla. 1978); Elledge v. State, 346 So.2d 998 (Fla. 1977). [395 So. 2d at 499-500].

Subsequent to Peek v. State, the Florida Court said in Lewis v. State, 398 So. 2d 432 (Fla. 1981):

> The finding that appellant committed the capital felony while under a sentence of imprisonment was based on the fact that he was on parole from a prison sentence at the time of the murder. Based on evidence of this fact, we approve the court's finding of this aggravating circumstance. [398 So. 2d at 438].

In Dobbert v. State, 375 So. 2d 1069 (Fla. 1979), cert. den. 447 U.S. 912, reh. den. 448 U.S. 916, the Florida Court held, and the United States Supreme Court denied certiorari, that:

> Although two aggravating circumstances were improperly determined to exist, we conclude that the trial court properly found that the murder was committed to avoid lawful arrest and was especially heinous and cruel. . . .
>
> * * * *
>
> . . . The evidence is not such as would require the trial court to find any of the mitigating circumstances proposed by Dobbert as a matter of law. Since there are one or more validly found aggravating circumstances and no mitigating circumstances, a reversal of the death sentence is not necessarily required. Elledge v. State, 346 So.2d 998 (Fla.1977); Hargrave v. State, 366 So.2d 1 (Fla.1978). [375 So. 2d at 1070, 1071].

Jackson v. State, 381 So. 2d 1040 (Miss. 1980), involved an appeal from an enhanced sentence where it was contended that the statute required that a defendant actually serve the sentence through physical incarceration (Jackson's prior sentence had been suspended). We held the following:

> Jackson argues the conjunctive phrasing "and who shall have been sentenced . . ." evidences a legislative intent to include within the class of habitual offenders only those who have been twice convicted of distinct felonies for which penitentiary terms have not only been pronounced as punishment, but also served through actual incarceration. We reject this argument, because we think the statutory intention

> is satisfied where, as here, the accused has been twice previously adjudged guilty of distinct felonies upon which sentences of one year or more have been pronounced, irrespective of subsequent probation or suspension of the sentences.
>
> We are of the opinion the statute is intended to cure the evil of recidivism. Enhanced punishment relates to the conduct underlying the previous convictions. Adjudication of guilt and consequent pronouncements of sentences merely accord those convictions finality. Subsequent suspension of the sentences or probation is a matter of grace only, arising from the hope that the prospects of rehabilitation of the guilty warrant leniency. Clearly that hope is defeated when the beneficiary of the indulgence perpetuates further felonies. The statute is suited precisely to this problem. [381 So. 2d at 1042].

We are of the opinion that, under Mississippi statutes and decisions, when a person has been convicted and placed on probation, particularly here, where four (4) years of a five-year sentence were suspended, such sentence is a sentence under imprisonment. Even so, there were other aggravating circumstances in the present case, and, under the Florida decisions, they were sufficient to sustain the conviction.

III.

Did the trial court err in admitting into evidence at the sentencing phase of a death penalty case, proof of matters admitted by the defendant by his plea of guilty in open court, where such proof was not related to the aggravating circumstances set forth in Mississippi Code Annotated § 99-19-101 (1972)?

Appellant argues that certain evidence and exhibits introduced were erroneous and prejudicial since he pled guilty to the robbery-murder and that proof should have been limited to matters not admitted in his guilty plea. An orderly and coherent procedure in the sentencing phase requires proof of the manner in which the homicide was committed. Facts relevant to an aggravating circumstance are competent. The statute sets

forth eight (8) aggravating circumstances, any one, or more, of which may be proved. The State introduced nine (9) color photographs showing the body of the victim and the scene of the crime. Appellant contends that they were inflammatory and, since he had admitted the homicide, were not relevant in the sentencing phase.

Slides 1 and 2 show the cash register and the open cash drawer found by the police shortly after the robbery-murder. Slices 3 through 9 show the body of the victim and the surrounding store area. We think that the slides were competent and relevant on the issues of whether or not (1) the capital offense was committed while the appellant was engaged in the commission of robbery, and (2) the capital offense was committed for the purpose of avoiding or preventing lawful arrest, and (3) the capital offense was especially heinous, atrocious or cruel. In Coleman v. State, 378 So. 2d 640 (Miss. 1978), the Court had for consideration two (2) color photographs showing where shotgun pellets hit the victim on the right side of the head, lower arm and left side of his chest. The Court held that they were competent and had probative value on the aggravating circumstance of especially heinous, atrocious or cruel.

We have examined the opinions in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980) and Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982),[1] which discussed the phrase in an aggravating circumstance "outrageous or wantonly vile, horrible or inhuman in that they involved . . . depravity of mind . . . ." (Georgia) and "was especially heinous, atrocius or cruel." (Mississippi). The decision of

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[1]All trial judges should study the opinions in Godfrey and Jordan before submitting the aggravating circumstances in § 99-19-101(5)(h) to the jury.

the Georgia Supreme Court in Godfrey was reversed, the United States Supreme Court holding that the Georgia court did not apply a proper constitutional construction of the phrase. Jordan was reversed, following Godfrey, on the ground that in Jackson v. State, 337 So. 2d 1242, 1250 (Miss. 1976), the Mississippi Supreme Court gave no proper guidance to the jury for imposition of the death penalty on that aggravating circumstance.[2]

In the case sub judice, the victim was forced to kneel on the floor behind the counter with a .38-caliber revolver pointing at his head, he was made to stand up at gunpoint and open the cash register, and again was forced to kneel on the floor with the revolver still pointing at his head. He was physicially assaulted by one of the robbers emptying his pockets, all occurring over a short period of time. From those facts, the jury could consider mental torture and aggravation which the victim probably underwent, and to determine whether or not the murder under all the facts and circumstances was especially heinous, atrocious or cruel. Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel, three (3) other aggravating circumstances were proved by overwhelming evidence.

Dr. Baldev Pahwa, brother of the deceased, testified for the State and identified his deceased's brother from one of the photographs. The witness was emotional and sobbed on the witness stand.[3] The appellant argues that the testimony

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[2]Decided before enactment of Mississippi Code Annotated § 99-19-191 (Supp. 1977).

[3]The appellant's mother testified in his behalf. While on the witness stand, she sobbed, cried and was as emotional, or more so, than Dr. Pahwa.

was calculated to inflame the jury more than the pictures introduced. We are unable to say that his testimony was not relevant and did not have probative value. It was for the purpose of identifying the victim and, as we have said in other cases, the appellant caused the situation and cannot complain, if the evidence has probative value.

Appellant next contends the court should have stricken from the appellant's confession (1) that part setting forth he and Artis planned to rob the food store and possibly slay the store clerk, (2) that he saw "Alfonso behind the counter pointing the gun at the man who was down on the floor on his knees," (3) that part relating to what appellant and Artis did following the murder, (4) that part stating it was his idea to rob R.J.'s Food Center, and (5) that part to the effect that he shot the man because "The man knew me and I did not want him to identify me."

We think that the entire confession was properly admitted in evidence. It was a part of the orderly presentation of the State's case and was relevant on the issues of aggravating circumstances submitted to the jury.

IV.

Did the lower court err in overruling the motion for mistrial when a witness testified that the victim's pregnant wife appeared at the scene of the crime shortly after it occurred?

Officer Willie Allen testified for the State, and during his testimony, the following question and answer was asked and given:

Q. And at the time you arrived there, other than the deceased, was there anyone else connected with R. J.'s Food Center there that you observed?

A. Okay. After getting the information from some of the witnesses that were working across the street, the family came, his wife and she was about seven or eight months pregnant and his mother and father--

The answer was not responsive to the question. Appellant's attorney objected on the ground that the wife's pregnancy unknown to the appellant prior to the homicide, had no relevancy to the aggravating circumstances and was prejudicial to the defendant. The trial judge sustained the objection in chambers, and asked appellant's attorney, if he desired him to instruct the jury to disregard the statement. The attorney argued for a mistrial, which was denied, and then told the trial judge he had no alternative except to request the jury be instructed to disregard the statement.

Each juror said that he (she) would disregard the statement. The jury is presumed to have followed the directions of the judge. There was no error under Hughes v. State, 376 So. 2d 1349 (Miss. 1979); Gray v. State, 375 So. 2d 994 (Miss. 1979); and Duke v. State, 340 So. 2d 727 (Miss. 1976).

Further, the court instructed the jury in Instruction No. 1 to "disregard all evidence which was excluded by the court from consideration during the course of the trial."

V.

Did the lower court err in permitting a witness to testify that the appellant said he killed the victim because he was "cold hearted?"

Alfonso Artis, the accomplice, testified that he asked appellant why he shot Mr. Pahwa, and appellant replied, "I was cold hearted." Appellant testified on the trial that "I didn't mean to do it and I'm sorry." The statement he made to Artis

soon after the homicide was relevant on the issue of aggravating circumstances.

In Washington v. State, 361 So. 2d 61 (Miss. 1978), the facts were similar to those here. There, the defendant struck the victim over the head with a shotgun, had obtained the money and was backing out of the store when he shot the victim in the stomach with the shotgun. The testimony here shows that, as in Washington, he could have fled without cold-heartedly killing the proprietor of the store.

VI.

Did the lower court err in permitting the prosecution to cross-examine the defendant's mother about his prior juvenile record?

During the defense's direct questioning of appellant's mother, Mary Lewis, the following occurred:

> Q. Why did he not finish the tenth grade?
>
> A. Well, Connie, he stopped to look for work and he would get odd jobs, you know, in order to help me and he would cut yards or whatever he could find to do and he would bring me most of the money. Sometimes he would give it all to me. And he was real good about helping me. I never had no trouble out of him and when I had surgery, he stayed with me all the time. He cooked and waited on me and saw that I got my medicine. He was a good child and I don't know why he got into this. I reckon because he was with the wrong person, 'cause I never had no trouble out of him before. (Witness sobs). [Emphasis added].

The State cross-examined Mrs. Lewis on that response, and she reiterated the appellant had been into different little things a good while ago. The prosecuting attorney asked what little things she was talking about that he had been involved in, and she said he had gotten into something and he was released to his parents three or four times. She was interrogated in detail about those several times, but nothing was indicated as to what the matters involved or how they were disposed of

in the Youth Court. Appellant contends that the Youth Court Act prohibits use of an adjudication of the Youth Court for impeachment purposes in any court. The contention is correct, except that the right of a defendant or prosecutor in criminal proceedings is preserved to show bias or interest. Here, no reference was made to Youth Court proceedings or action, and no attempt was made to introduce any adjudication order. Also, the questions asked were proper to test the recollection of the witness and was in rebuttal. Allison v. State, 274 So. 2d 678 (Miss. 1973); Kearney v. State, 68 Miss. 233, 8 So. 292 (1890).

VII.

Did the lower court err in failing to rule on the admissibility of appellant's letter to Alfonso Artis in a proper and timely fashion?

While appellant and Artis were incarcerated before trial, appellant wrote Artis that, if he (Artis) continued to cooperate with the police, appellant would "do to you the same thing I did to that man in the store . . . ."

During cross-examination of appellant's mother, the State introduced the letter as a handwriting specimen. It was marked for identification but not admitted into evidence. After Mrs. Lewis completed her testimony, the appellant moved to suppress the letter, or, that the trial judge rule on its admissibility, if it were offered in evidence later during the trial. The judge declined to make an advance ruling. Appellant testified and, on cross-examination, the State confronted him with the letter and the trial court admitted it in evidence.

We do not think the judge was required to make an advance ruling and that such refusal was not error.

VIII.

Did the lower court err in refusing Jury Instructions D-3, D-4 and D-8?

Instruction D-3 follows:

> I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

Instruction 7 (S-1) granted by the court instructed the jury that it must find the existence of certain statutory aggravating circumstances beyond a reasonable doubt prior to any consideration of the death penalty. It further limited the statutory aggravating circumstances to those four (4) on which evidence had been adduced during the trial.

Instruction D-4:

> The Court instructs the Jury that the terms heinous, atrocious, and cruel are deemed to include those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies in that it involved the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find from the evidence that the victim died a quick death without unnecessary pain and torture, then, though the crime is murder, it is not to be considered as especially heinous, atrocious or cruel.

In our opinion, under the facts of the case sub judice and under the Mississippi statute, Instruction D-4 was too restrictive and its refusal does not constitute reversible error notwithstanding Godfrey v. Georgia. Further, the discussion under Part III hereinabove applies on this question.

Instruction D-8:

> The Court instructs the Jury that even if you find that aggravating circumstances outweight the mitigating circumstances, you may still recommend mercy and sentence the Defendant to life imprisonment.

The sense of that instruction was submitted in Instructions D-1 and D-7.

Instruction D-1

* * * *

> You are instructed that even if you find the existence of one, two, three or more aggravating circumstances, you still can conclude that the circumstances are insufficient to warrant death, and you may impose a sentence of life imprisonment.

Instruction D-7

> The Court instructs the Jury that you are not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial Court, but you must find a statutory aggravating circumstance before recommending a sentence of death.

IX.

Did the lower court correctly grant State's Instruction No. 7 (S-1)?

The mentioned instruction sets out the four statutory aggravating circumstances relied upon by the State. Appellant claims that the evidence did not show the homicide to be heinous, atrocious and cruel, nor did it properly establish that he was under sentence of imprisonment at the time the crime was committed.

These questions have been previously discussed hereinabove and lack merit.

X.

Did the lower court err in overruling objections to parts of the closing argument of the prosecution?

In the defense attorney's argument, Honorable James Bell made the following statement:

> Keep in mind this. That there is a co-defendant here who received what amounts to a five-year sentence and ask yourself is it fair if the man wasn't holding the gun. He said that they talked about killing the man the day before. Ask yourself is it fair for him to get five years and Connie Ray Evans get death.

The district attorney, in answer, made the following statement: "You can sentence the defendant to life imprisonment but that's your sentence . .. that's just your sentence, ..."

The appellant argues that the statement by the district attorney was an insinuation that, if the jury fixed the sentence at life, appellant would not serve life in the penitentiary. In our opinion, the argument of the district attorney may be interpreted in whatever manner the hearer wishes to interpret same. It does not say what appellant's counsel interprets it to say. If the argument was improper, then it could be said that the appellant's attorney provoked the comment in response to his argument.

We are of the opinion that the district attorney's statement does not constitute prejudicial or reversible error.

APPELLATE REVIEW OF SENTENCE

In accordance with Section 99-19-105 (3)(a)(b)(c) . . . (5), and the decisions of this Court and the Federal courts on imposition of the death penalty, we have carefully reviewed the record in this case and have compared it and the death sentence imposed in the cases which have been decided by this Court since Jackson v. State, 337 So. 2d 1242 (Miss. 1976). Those cases consist of fourteen (14) decisions by this Court from Bell v. State, 360 So. 2d 1206 (Miss. 1978), to King v. State, No. 53,027, decided October 27, 1982 [not yet reported], in which the death penalty was upheld.[4] In Coleman v. State, 378 So. 2d 640 (Miss. 1979) the case was reversed as to punishment and remanded for resentencing to life imprisonment.

[4]A list of the cases is attached as Appendix A in King v. State.

In our opinion, after such review and comparison, the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other and the death penalty will not be wantonly or freakishly imposed here.

We also find and conclude that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor. The evidence in the case overwhelmingly supports the jury's finding of at least one statutory aggravating circumstance, viz: (1) the capital offense was committed by appellant while under sentence of imprisonment; (2) the capital offense was committed while the defendant was engaged in committing a robbery, (3) the capital offense was committed for the purpose of avoiding a lawful arrest, and (4) the capital offense was especially heinous, atrocious or cruel.

After comparison of the present case to those enumerated herein, we find that the sentence of death is not excessive or disproportionate to the penalty imposed in those cases, considering both the crime and the manner in which it was committed and the defendant. We also are of the opinion that the death penalty imposed on Evans is consistent and even-handed to like and similar cases and the sentencing phase followed in this trial provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not imposed.[5]

The judgment of the lower court is affirmed, and Wednesday, December 1, 1982, is set for the date of execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AND WEDNESDAY, DECEMBER 1, 1982, SET FOR EXECUTION OF THE DEATH PENALTY.

PATTERSON, C.J., SUGG, P.J., WALKER, P.J., BROOM, BOWLING, HAWKINS, DAN LEE and PRATHER, JJ., CONCUR.

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[5] Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

82-6267

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONNIE RAY EVANS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Connie Ray Evans by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Mississippi without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at Mississippi State Penitentiary, Parchman, Mississippi. Mr. Evans' affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

David M. Corwin
140 Henry Street
Brooklyn, N.Y. 11201

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONNIE RAY EVANS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

STATE OF NEW YORK)
): ss:
COUNTY OF NEW YORK)

AFFIDAVIT

DAVID M. CORWIN, being duly sworn, states:

1. I am an attorney for Connie Ray Evans, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Evans' motion for leave to proceed in forma pauperis. My representation of Mr. Evans is without remuneration.

2. Mr. Evans is presently in the custody of the State of Mississippi and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Evans by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Evans is attached hereto.

3. Counsel was appointed to represent Mr. Evans at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Evans is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Evans is entitled to redress in this action.

David M. Corwin
DAVID M. CORWIN

Sworn to before me this
14th day of February, 1983

Notary Public

JOEL BERGER
Notary Public, State of New York
No. 31-4631197
Qualified in New York County
Commission Expires March 30, 1984

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONNIE RAY EVANS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

I, Connie Ray Evans, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Circuit Court of Hinds County, a trial court of the State of Mississippi, of murder and kidnapping with bodily injury, and was sentenced to death. I am being held at the Mississippi State Penitentiary in Parchman, Mississippi. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

_____
Connie Ray Evans

STATE OF MISSISSIPPI

COUNTY OF SUNFLOWER

The foregoing affidavit of Connie Ray Evans was subscribed and sworn to before me this _____ day of 1983.

_____
Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

82-6267

CONNIE RAY EVANS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

and

BY: AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

QUESTIONS PRESENTED

I.

Whether, in this capital case, petitioner may raise an issue not presented in the state courts and whether evidence that petitioner single-handedly executed an innocent store clerk as he knelt with his hands behind his back, satisfies the mandate of Enmund v. Florida, ___U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which provides that intent may be properly shown by evidence that the petitioner actually killed the victim?

II.

Whether petitioner may belatedly raise issues not presented at the state court level and whether the existence of four aggravating circumstances, found by the state Supreme Court to be supported by the evidence, validate and underpin a sentence of death?

III.

Whether a prospective juror was properly excused for cause on her statement that she positively could not return a verdict recommending the death penalty in this case?

IV.

Whether petitioner may raise ineffectiveness of counsel before this Court and whether he was entitled to a court appointed psychiatric expert where he was determined competent to stand trial by a neutral psychiatrist, he did not request appointment of his own expert, and there was absolutely no evidence that he was insane or suffering from diminished mental capacity?

V.

Whether petitioner may raise questions which are not of federal substance and whether the state court properly determined admissibility of evidence during the sentencing phase?

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IN THE

SUPREME COURT OF THE UNITED STATES

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82-6267

CONNIE RAY EVANS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Connie Ray Evans v. State of Mississippi, 413 So.2d 1007 (Miss. 1982). Rehearing was denied on May 26, 1982. A copy of the opinion affirming conviction and sentence is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3), and poses a single question for review.

STATEMENT OF THE CASE

Connie Ray Evans pled guilty to capital murder in connection with the shooting death of Arun Pahwa during the commission of an armed robbery of the Jackson, Mississippi, convenience store in which Pahwa was employed. Following a separate trial relative to sentencing (required by M.C.A. § 99-19-101 (Cum. Supp. 1982)), appellant was sentenced to die in the gas chamber. On automatic

appeal to the Mississippi Supreme Court, conviction and sentence were affirmed by a unanimous court on November 3, 1982 and an execution date of December 1, 1982 was decreed. Timely petition for rehearing was filed by petitioner's counsel and denied on December 15, 1982. A stay of execution pending timely filing of this petition was granted by this honorable Court on January 13, 1983.

The facts of the robbery-killing, as found by the Mississippi Supreme Court, follow:

FACTS

> Connie Ray Evans was twenty-one (21) years of age at the time of the homicide. On the night of April 7, 1981, he and Alfonso Artis, age twenty-four (24), met at the Alamo Theater on Farish Street in the City of Jackson, Mississippi, and planned to rob R.J.'s Food Center on Lynch Street. They considered the fact that gunplay might be involved in the robbery. About 6:30 the following morning, Artis went to the house where Evans lived with his mother and stepfather, and they left together for the R.J. Food Center. Upon arrival there, they walked by the store on two occasions but did not enter because customers were present. After waiting approximately one-half hour they began the robbery. Artis went inside with a gun while Evans waited outside and watched for trouble. Artis drew the gun on Arun Pahwa, the store attendant, and forced him at gunpoint to get on his knees behind the counter. Evans entered the store, received the gun from Artis, held it on Pahwa and guarded him while Artis checked the cash register. Artis could not open the cash drawer, and Pahwa was made to get up from the floor, open the cash register and then was forced to kneel again. Artis collected money from the cash register and then searched and emptied Pahwa's pockets and wallet.
>
> Evans shot Pahwa in the head as he knelt motionless behind the counter and the two ran out the door. They had obtained approximately one hundred forty dollars ($140.00) in the robbery. Artis took off his shirt and wrapped the gun in it as they ran. Later, he gave the gun to Evans, who wiped away some of the fingerprints, and they hitchhiked to appellant's brother's house where Evans hid the gun behind a clock. They left there, caught a bus to the downtown area, and spent most of the money on new clothes. That night, they went to a movie, drank beer at a local club, then separated and went home. Evans told Artis that he shot Pahwa because "I was cold hearted."
>
> The police were notified of the robbery and murder and went to the scene where they found the cash drawer open and Pahwa lying behind the counter in a pool of blood. The cause of death was a gunshot wound in the head. As a result of police investigation, Artis was apprehended on the night of April 8, 1981, and Evans was arrested seventeen (17) days later

> on April 25, 1981. He stayed on the streets during this time and finally telephoned his mother and decided to give himself up. Evans gave a written confession to the crime. Artis pled guilty to charges of armed robbery and manslaughter and received a sentence of twenty (20) years, with fifteen (15) years suspended. He testified for the State on the trial.
>
> 422 So.2d at 739.

REASONS FOR
DENYING THE WRIT

I. Petitioner did not raise an issue of "intent to kill" in the lower court or on appeal and may not raise that ground for the first time before this Court.

Following an erroneous contention that the record does not reflect a factual finding that he intended to kill the victim, petitioner asserts that his sentence of death thus contravenes the Eighth Amendment of the United States Constitution. Although this claim may be refuted in substance via brief discussion, the state would first and foremost suggest that consideration of the issue is procedurally barred by petitioner's failure to present it to the lower trial court or the state supreme court. Certainly it is at this juncture well-settled that federal courts "will not decide federal constitutional issues raised for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969). The reasoning behind this rule and the effect of its operation were explained further as follow:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U.S. 92, 17 L.Ed.2d 189, 87 S.Ct. 252 (1966), they should be given the first opportunity to consider them.
>
> (394 U.S. at 439, 22 L.Ed.2d at 400)

Affirmed in the subsequent decisions of Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) and Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981), this rule mandates absolute bar of petitioner's claim before this Court.[1/]

Assuming petitioner had properly raised and preserved his claimed lack of intent to kill, the record is replete with evidence that petitioner actually killed Arun Pahwa, evidence which was conclusively held to prove intent in Enmund v. Florida, __U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Enmund's petition for certiorari was granted, ___ U.S. ___, 70 L.Ed.2d 246, 102 S.Ct. 473 (1981), to consider the validity of the death penalty under the Eighth and Fourteenth Amendments "'for one who neither took life, attempted to take life, nor intended to take life.'" Enmund, supra, 73 L.Ed.2d at 1145. A review of the opinion reveals that this question was consistently considered in the disjunctive rather than the conjunctive throughout.

> It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape.
>
> 73 L.Ed.2d at 1146.
>
> While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," Coker v. Georgia, 433 U.S., at 596, nor as compelling as the legislative judgments considered in Coker, it nevertheless weights on the side of rejecting capital punishment for the crime at issue.
>
> 73 L.Ed.2d at 1149.

1/ The contention that the state court raised the intent question sua sponte by noting petitioner's testimony that he "didn't mean to do it and was sorry" (See petition at 5) is utterly specious. Assuming this mere inference did in some way raise the issue, it must then ben assumed that the state supreme court "implicitly rejected . . . the federal claim." Webb, supra.

> That is not relevant to this case, however. Rather at issue is the number of states which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill.
>
> 73 L.Ed.2d at 1149 n. 15.
>
> Petitioner's argument is that because he did not kill, attempt to kill, and he did not intend to kill, the death penalty is disproportionate as applied to him, and the statistics he cites are adequately tailored to demonstrate that judges - and perhaps prosecutors as well - consider death a disproportionate penalty for those who fall within his category.
>
> * * *
>
> Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.
>
> 73 L.Ed.2d at 1151.
>
> Enmund himself did not kill or attempt to kill; and as considered by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder . . . . Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.
>
> 73 L.Ed.2d at 1152.

The inapplicability of Enmund to petitioner's case is obvious and total. Petitioner pled guilty to actually killing Arun Pahwa by shooting him in the head with a handgun. Certainly, regardless of any ambiguity a claimant might seek to squeeze from the opinion in Enmund, it is well-established that one who actually kills is not afforded escape from capital punishment by Enmund's meaning.

Additionally, petitioner was found to have killed to avoid lawful arrest, a factor set out as an aggravating circumstance in M.C.A. § 99-19-101 (4)(e) (Supp. 1981). This finding, unchallenged

by petitioner, has been determined to embody proof that the murder was for a deliberate purpose and thus, was intentional. As held in the recent case of Gray v. Lucas, 677 F.2d 1086, (5 Cir. 1982), and stated forcefully in the petition for rehearing, Gray v. Lucas, 685 F.2d 139, 140 (5 cir. 1982), a "finding (of murder to avoid arrest) is equivalent to a finding of intent."

With a finding of intent having been made, even a properly preserved claim of this nature would be meritless.

II. Whether petitioner may belatedly raise issues which were not timely presented to the state courts and whether the existence of four aggravating circumstances validates and underpins a sentence of death?

A. This claim is barred from review due to failure of petitioner to raise it in proper context at the state Court level.

The precise issue presented by this question is injected for the first time into the case at this level. In having failed to address the claim in his petition for rehearing before the Mississippi Supreme Court, petitioner has run afoul of the rule in Cardinale, supra, Street, supra, and Webb, supra barring consideration of claims not presented to the state courts for consideration. Accordingly, the writ prayed for should be denied.

B. The four aggravating circumstances as basis for imposition of death penalty were valid considerations for the jury.

Petitioner raises the problem of Zant v. Stephens, 631 F.2d 397 (5th Cir. 1980) posing situation of an appellate review which invalidates the consideration of one aggravating circumstance for purposes of the death penalty and the consequential validity of death penalty. In support of this contention, petitioner unjustifiably construes the opinion of the State Supreme Court as having found one of the four aggravating circumstances, i.e., the heinous, cruel and atrocious nature of the murder, to be incorrectly applied as unsupported by the evidence. This farreaching conclusion cannot be conservatively adduced from a reading of the opinion in its pertinent parts:

> In the case sub judice, the victim was forced to kneel on the floor behind the counter with a .38 caliber revolver pointing at his head,

> he was made to stand up at gunpoint and open the cash register, and again was forced to kneel on the floor with the revolver still pointing at his head. He was physically assaulted by one of the robbers emptying his pockets, all occurring over a short period of time. From those facts, the jury could consider mental torture and aggravation which the victim probably underwent, and to determine whether or not the murder under all the facts and circumstances was especially heinous, atrocious or cruel. Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel, three (3) other aggravating circumstances were proved by overwhelming evidence. (emphasis added)

Evans v. State, 422 So.2d 737,743 (Miss. 1983)

Clearly, the state Court explicitly recognized that under the particular set of facts, it was within the jury's province to consider the "mental torture and aggravation" that the deceased suffered. Accordingly, as evident by the imposition of the death penalty partly based on the aggravating circumstance at issue, the jury did find that the instant facts were sufficient to support consideration of the "heinous, atrocious and cruel" factor of the murder./1 The Court's opinion in no way determined that the "heinous, atrocious and cruel" factor was invalid in the case sub judice. Rather, the legal sufficiency of the aggravating circumstance was expressly recognized. The language of the opinion challenged is at best mere surplusage to the Court's determination that the aggravating circumstance of the murder being "especially heinous, atrocious and cruel" was legally sufficient and supported by the evidence. Thus, petitioner's contention that there is a Zant v. Stephens problem is without merit./2

/1 The Mississippi Supreme Court's interpretation of this aggravating circumstance has been approved as constitutional by the Fifth Circuit Court of Appeals in Gray v. Lucas, 685 F.2d 139 (5 Cir. 1982)

/2 Assuming the court had found the challenged circumstance factually insufficient, the three remaining aggravating circumstances protect the validity of the sentence. Quite clearly, the problem encountered in Zant v. Stephens does not exist where

III. A prospective juror who makes unshakingly clear her inability to consider imposing the death penalty in the case under consideration is properly excused from jury service under the teachings of Witherspoon and its progeny.

Exlcusion of venireman Odom for conscientious objection to capital punishment followed extensive voir dire in which she forcefully stated numerous times that she could not vote for the death penalty in a case where a robbery was committed and a single individual was killed. The opinion of the Mississippi Supreme Court, specifically that portion upholding the exclusion of Ms. Odom, is not at variance with the applicable decisions of this Court, thus, the issue here raised does not warrant judicial response.

In summary, petitioner's position is that since Ms. Odom recognized that there might be some abstract factual scenario in which she could consider imposing the death penalty, her exclusion was improper under Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776 (1968). This argument proceeds in absolute blindess to the decided preponderance of the colloquy between Ms. Odom and counsel in which she made crystally clear her inability to even consider the death penalty in this case. It is beyond debate that potential jurors may be culled from service where

> Their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), quoting from Witherspoon, 391 U.S. 510, 519.

In the present case, the Mississippi Supreme Court concluded, after citing and discussing Witherspoon, that the exclusion of Ms. Odom was correct in light of her professed inability to consider imposing death in this case. This conclusion is in

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/2 (cont'd) the invalid circumstance is flawed merely by evidentiary insufficiency rather than unconstitutionality. In support, see Ford v. Strickland, 696 F.2d 804, 814 (11 Cir. 1983), Williams v. Maggio, 679 F.2d 381, 390 (5 Cir. 1982), Zant v. Stephens, 297 So.2d 1 (Ga. 1982) (on recertification from this court).

conformity with the Fifth Circuit Court of Appeals' recent decision in Williams v. Maggio, 679 F.2d 381 (5 Cir. 1982). Therein, the Court crystallized somewhat the inherent wisdom in viewing death penalty related exclusion of jurors from a reading of the entire voir dire rather than from a narrow and limiting focus on talismanic professions of absolute opposition to the entire concept of capital punishment. The following excerpt from Williams is particularly appropos in response to petitioner's claim before this Court:

> Petitioner charges that Ms. Brou's responses fall far short of demonstrating automatic opposition to the death penalty. He attributes the absence of Witherspoon talismanic responses on the record to the State's failure to propound hard questions about opposition to the death penalty. We disagree. If one examines the underscored portion of her statement, one clearly finds that she did state that she could not return a death sentence. When the prosecutor inquired again to assure that she could not consider this penalty, Ms. Brou responded that she did not think she could do it. When this response is viewed in conjunction with her previous statement of clear opposition to the death penalty, the record of automatic opposition to the death penalty is established.
>
> Witherspoon and its progeny do not mandate that a prospective juror aver that she would refuse to consider the death penalty in every case that could possible arise. If she knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused. Ms. Brou's responses demonstrate that she would be unwilling to consider the death penalty where the crime charged was murder committed during a robbery. She does leave open the possibility that she would consider this penalty in a more "hideous" case. Her unwillingness to do so here, however, is firm.
>
> By means of this appeal, petitioner asks this Court to narrow further the stiff requirements of Witherspoon and its progeny and, in this Court's opinion, thereby infringes the State's right to an impartial jury that is willing to consider all penalties provided by law. According to petitioner's analysis, exclusion of a venireman is impermissible unless he states in response to all questions that he absolutely refuses to consider the death penalty. An equivalent response framed in any other reasonable manner is judged to demonstrate that the individual's position is not firm. We reject such a rigid, unthinking interpretation of Witherspoon. Form will not be placed over substance.
>
> 679 F.2d at 385-386 (emphasis added)

The exclusion of Ms. Odom from jury service is in full adherence to constitutional guidelines and was not error.

IV. Failure to Request Court-Appointed Psychiatric Expert may not be Charged as Ineffective Assistance Where Such Claim was Not Raised in the Lower Court, and would be Meritless if properly preserved for Review.

Petitioner's attempt to avoid procedural waiver of his claim of ineffective assistance, made for the first time in this petition, rests on a single statement by the trial judge that the defense was represented by "an experience and capable attorney." (Petition at 6) He cannot, by use of such an offhand comment, invoke the jurisdiction of this Court and has totally waived any constitutional claim based on assistance of counsel by his failure to provide the state courts with a meaningful signal of his complaint. As pointed out earlier in this response, federal constitutional claims raised for the first time before this court are barred from consideration, and in present application, this rule dictates dismissal of the petitioner's claim herein. Cardinale, supra, Street v. New York, supra, Webb, supra.

Assuming proper preservation of the point, it still appears wholly witout merit. In essence, petitioner would have this Court conclude that his trial counsel was ineffective for failing to secure his own competency determination of petitioner. Surely had trial counsel done this, he would have defeated his own strategy. In seeking to plead guilty to capital murder, it was in the best interest of petitioner that his counsel show his client competent to make such a plea, rather than attack competency as suggested in this petition.

The record in this case bears out not a single shred of proof that mental capacity was an issue in the crime or later trial. Petitioner's defense was one of remorse. Having had that defense fail, he seeks now to change horses in mid-stream and ride to reversal on a claim that a psychiatric defense was obvious. This claim is totally devoid of merit. Had the state

court been presented with timely submission of the issue of competent counsel, the conclusion would have it that trial counsel made a reasoned strategic decision to rely on petitioner's tender age, lack of significant criminal history, and remorse to sway a merciful verdict from the jury. In the absence of any evidence tending to infer that petitioner was mentally incompetent, this strategy defies assault.

V. Petitioner's Claim of Contaminating Evidentiary Interplay between the Guilt and Punishment Phases of his Trial dies not present a Federal Question and is Barred from this Court's Review.

Lastly, petitioner alleges that evidence rendered conclusive by this guilty plea was improperly introduced during the penalty phase. Petitioner has not isolated or voiced any constitutional ramifications of his claimed error, thus, evidentiary admissibility remains in this case purely a matter of state law beyond this Court's jurisdiction to review.

In substance, this Mississippi Supreme Court properly resolved this same claim on review below, concluding as follows:

> Appellant urges that certain evidence and exhibits introduced were erroneous and prejudicial since he pled guilty to the robbery-murder and that proof should have been limited to matters not admitted in his guilty plea. An orderly and coherent procedure in the sentencing phase requires proof of the manner in which the homicide was committed. Facts relevant to an aggravating circumstance are competent. The statute sets forth eight (8) aggravating circumstances, any one, or more, of which may be proved.
>
> (court's opinion at 7-8)

The court proceeded to legitimate all the evidence challenged as properly relating to the aggravating circumstances and/or the manner in which the homicide was committed. This finding negates petitioner's current argument. The state would suggest that implicit in the Mississippi Supreme Court's holding is the recognition that capital defendants may not use a plea of guilty to foreclose any evidence during sentencing of the manner and circumstance of the killing. To allow such a result would be to

impose the serious burden of determining sentence on a jury ignorant of many of the facts of the crime. Capital sentencing statutes are geared to constitutional conformity and cannot be so easily tampered with by trial strategy lest defense counsel lead the way into arbitrary infliction of sentence.

CONCLUSION

The state urges that the petition in this case be denied.

Respectfully submitted,

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CERTIFICATE

I, Amy D. Whitten, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, first class postage prepaid, a copy of the foregoing Brief In Opposition to Petition For Writ of Certiorari To The Supreme Court of Mississippi to Honorable David M. Corwin, 140 Henry Street, Brooklyn, New York 11201.

This, the 12th day of April, A.D., 1983.

SPECIAL ASSISTANT ATTORNEY GENERAL